Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1245

PARADISE PALMS COMMUNITY ASSOCIATION,
Petitioner,

— vs. —

PARADISE HOMES, IRWIN MOLASKY and HARRY LAHR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES..... iii

OPINIONS BELOW..... 1

JURISDICTION..... 2

QUESTIONS PRESENTED..... 2

CONSTITUTIONAL PROVISION INVOLVED.. 3

QUESTIONS INVOLVED..... 4

STATEMENT OF THE CASE..... 4

HOW FEDERAL QUESTION WAS PRESENTED. 7

REASONS FOR GRANTING THE WRIT..... 8

CONCLUSION..... 11

Appendix A
Opinion..... 12

Appendix B
Order Granting Summary Judgment
and Summary Judgment..... 17

Appendix C
Order Denying Rehearing..... 19

Appendix D
Complaint..... 21

Appendix E
Excerpt from the Record -
Notice and Motion for Summary
Judgment..... 31

Appendix F
Excerpt from the Record -
(Proposed) First Amended and
Supplemental Complaint..... 33

Appendix G
Excerpt from Appellant's
Opening Brief..... 35

Appendix H
Appellant's Reply Brief..... 38

Appendix I
Petition for Rehearing..... 43

Appendix J
Excerpt from the Record -
Request for Admissions and
Answer to Request for
Admissions..... 45

TABLE OF CASES AND AUTHORITIES

Cases — Page

Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956)..... 10

Dimond v. Linnecke, 87 Nev. 464, 469, 489 P.2d 93, 97-97 (1971). 15

Edwards v. Carson Water Co., 21 Nev. 469, 34 Pac. 381 (1893).32

Fitzharris v. Phillips, 74 Nev. 371, 333 P.2d 721 (1958)...13

Jones v. Bank of Nevada, 91 368, 535 P.2d 1279 (1975).....16

Lang Syne Mining Co. v. Ross, 20 Nev. 127, 18 Pac. 358 (1888).....31,35, 41

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).....10

Page

Paradise Palms v. Paradise Homes, 89 Nev. 27, 505 P.2d 596 (1973 6,13,41

Paradise Palms Community Association v. Paradise Homes, Irwin Molasky and Harry Lahr, 93 Nev. Advance Opinion No. 159, 568 P.2d 577 (1977)..... 1

Paradise Palms Community Association v. Paradise Homes, 86 Nev. 859, 477 P.2d 859, (1970)..... 40

Randano v. Turk, 86 Nev. 123, 129-130, 466 P.2d 218 (1970).. 32,35

Schmidt v. Merriweather, 82 Nev. 372, 375, 418 P.2d 991 (1960)..... 31,35,10

Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d. 255..... 10

Spanos v. Skours Theatres Corp., 235 F.Supp. 1, 364 F.2d 161 (CA2) Cert. Den. 385 U.S. 987, 17 L.Ed.2d 448, 87 S.Ct. 597 (1966)..... 37

Page

Walker v. City of Hutchinson, Kan., 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d. 178 (1956)..... 10

Wilmurth v. District Court, 80 Nev. 337, 393 P.2d. 302 (1964)..... 13

AUTHORITIES

Statutes — Page

Nevada Revised Statutes

N.R.S. 42.010.....32,35

N.R.S. 78.625.....26,27

N.R.S. 78.625(2).....14,15

Nevada Rules of Appellate Procedure

NRAP, 3A(b)(b).....14,36

Nevada Rules of Civil Procedure

NRCP 4(a).....13

NRCP 10.....22

NRCP 58(c).....13

Supreme Court Rules

SCR 42.....15

United States Code

28 USC 1257(3), 62 Stat. 929..... 2,6,7

Page

United States Constitution

Fifth Amendment to the United States Constitution...37

Fourteenth Amendment to the United States Constitution..... 4,7,37, 44

Article VI, Section 4 to the United States Constitution..... 16

Constitution of the State of Nevada

Article 1, Section 1..... 33

Article 1, Section 8..... 34

IN THE

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PARADISE PALMS COMMUNITY ASSOCIATION,	)
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vs.	)
PARADISE HOMES, IRWIN MOLASKY and HARRY LAHR,	)
Respondents.	)

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEVADA

Petitioner, Paradise Palms Community Association, through its counsel, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nevada in the case of Paradise Palms Community Association v. Paradise Homes, Irwin Molasky and Harry Lahr, 93 Nev., Advance Opinion No. 159, 568 P.2d 577 (1977).

OPINIONS BELOW

The trial court entered an order granting summary judgment without opinion. The

order and judgment are attached as Appendix B. The opinion of the Supreme Court of Nevada is reported at 93 Nev. Advance Opinion No. 159, 568 P.2d 577 (1977). and is attached as Appendix A. A motion for rehearing to the Supreme Court of Nevada was denied December 7, 1977, without opinion by an order attached as Appendix C.

JURISDICTION

The Supreme Court of the State of Nevada affirmed the judgment of the trial court on September 13, 1977 and denied the motion for rehearing on December 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), 62 Stat. 929.

QUESTIONS PRESENTED

Petitioner, a non-profit association who has never appeared in the original action, has been barred on collateral estoppel from contesting the personal jurisdiction of a default judgment, because an individual member had unsuccessfully moved in the original action to vacate the judgment, even though the member was at the same time held to lack standing for the motion. In addition, the member failed to file a timely appeal resulting in the loss of the opportunity for appellate review on the merits of jurisdiction.

Under these circumstances was the application of collateral estoppel to bar the petitioner association a denial of due process?

Subsidiary Questions:

1. Was considering an appearance by the single member in the first action, without a further showing of authority than mere membership, as an appearance by the petitioner a denial of due process?

2. Was the issue here precluded, adequate service of process, necessary to the entry of the order in action one and if so was the application of collateral estoppel to it in this action a denial of due process?

3. Did the member fully and fairly litigate the issue involving jurisdiction?

4. Was the resultant loss of petitioner's opportunity for appellate review through the member's procedural mistake a denial of due process?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment

XIV, states in pertinent part:

> ". . . .nor shall any state deprive any person of life, liberty or property, without due process of law. . . ."

QUESTIONS INVOLVED

Is a default judgment, procured by collusive service of process upon the President of plaintiff corporation as an officer of defendant association without any other notice to the membership of the association, a denial of due process under the Fourteenth Amendment to the Consitution of the United States requiring appropriate relief such as the imposition of a trust upon property acquired at execution sale pursuant to the judgment?

STATEMENT OF THE CASE

This is the second time this matter has been before this Court, the previous being 72-1561 cert. den. 414 U.S. 865, 94 S.Ct. 129, 38 L.Ed.2d 117 (1973). This concerns an action to seek relief from a previous judgment against Petitioner, a Nevada association acquired by respondent, a Nevada corporation from which respondent obtained the petitioner's

only asset, a park, at execution sale. Petitioner, Paradise Palms Community Association, is a Nevada non-profit, non-stock incorporated association which had been formed by the respondent stock corporation, Paradise Homes and other joint developers to hold certain park land, in a subdivision they had developed, for the benefit of its members who are purchasers of late and residents of the subdivision. In Case No. A51193 in the District Court for Clark County, Nevada, Respondent procured a default judgment and purchased the park land at execution sale. Jursidiction was obtained by service of summons on the President of respondent, Paradise Homes, as an officer of petitioner with no other notice to the membership.

The action in the lower court consists of a complaint alleging these causes of action seeking relief from the above judgment and sale. The complaint is attached hereto as Appendix D. The first cause sought to have the judgment set aside on the ground that Mr. Molasky was not an officer of the petitioner association and therefore not a person upon whom service could be accomplished. The second cause sought to have a constructive trust or other relief imposed on respondents holding the land on the ground that Mr. Molasky receiving service, as president of the plaintiff in that action and as an officer of defendant, would be in conflict of interest and have a fiduciary duty toward petitioners such that the default judgment without notice to the

membership and the sale of the property to respondents effected a denial of due process under the Fourteenth Amendment as well as violate state law. The third cause was an action for damages based on the first two causes.

The trial court originally on respondents motion granted summary judgment as to the first cause on collateral estoppel based on the fact that a member of the association had tried to set aside the judgment in that action on the ground Molasky, the person served, was not an officer of the association and therefore not a person upon whom service could be accomplished. The Court had entered a finding that he was an officer with the conclusion service could be made upon him. Summary judgment was denied on the second and third causes of action. This was affirmed on appeal, Paradise Palms v. Paradise Homes, 89 Nev. 27, 505 P.2d 596 (1973). Certiorari was sought on the contention that the application of collateral estoppel to the first cause was a denial of due process. Certiorari was denied in this Court on October 9, 1973. 414 U.S. 865, 94 S.Ct. 129, 38 L.Ed.2d 117. Collateral estoppel has never been applied to the second and third causes of action.

On remand for consideration of the second and third causes of action petitioner moved for summary judgment on the ground

among others, that refusal to grant relief from a default judgment gained in effect by Paradise Homes serving itself without other notice is a denial of due process under the Fourteenth Amendment. (Record 652 - 659, excerpt is attached as Appendix E.) The trial court granted a cross motion for summary judgment to respondents without opinion, Appendix B, which has been affirmed by the Nevada Supreme Court, by opinion at Appendix A.

HOW FEDERAL QUESTION WAS PRESENTED

Petitioner first raised the Federal question in the Court of first instance, the District Court for Clark County, Nevada, by opposing respondents' first motion for summary judgment prior to the first appeal. (Record 261 - 265). After remand for consideration of the second and third causes of action following denial of certiorari regarding the first cause of action, petitioner moved for amendment of the Complaint to, among other things, make explicit relief under the due process clause of the Fourteenth Amendment. R. 364 - 380, excerpt included as Appendix F. This was denied, but petitioner again sought redress under the Fourteenth Amendment in its summary judgment motion. R. 652 - 659, excerpt included as Appendix E. The matter of federal due process was again raised on

appeal in the appellant's opening brief, excerpt included as Appendix G, appellant's reply brief, included as Appendix H, and Petition for Rehearing, excerpt included as Appendix I. Nevada courts have had sufficient opportunity to consider petitioner's due process rights.

REASONS FOR GRANTING THE WRIT

A default judgment gained by plaintiff serving the summons on its own president as an officer of defendant association without other notice is a denial of due process.

The facts are plain and uncontested. Irwin Molasky was President of Paradise Homes from August 8, 1961 to January 30, 1970 including the date of January 29, 1968 when he was served the summons as an officer of the petitioner association. (R. 73, 170, Request for Admissions and Answer, included as Appendix J.) Mr. Molasky made no attempt to notify the membership or act in any way on behalf of the association. (Molasky depo. 85 - 104). A default judgment was granted and respondent acquired petitioner's only asset, park land, at the sheriff's execution sale.

The original trial court on motion to set aside the judgment found that Molasky was an officer of the petitioner association and therefore under Nevada law a person who could be served with process for the association. Petitioner has been estopped in its proceeding from denying that Molasky was an officer of the petitioner association.

There is no case in which this Court has decided that the collusive use of dual offices in the fashion here effects a denial of due process. Certainly, the happening of this case shows the need for such a precedent. The violation of due process here is too gross to be tolerated and the employment of interlocking directorships and offices to plunder stockholders, (in this case members of an association) is perhaps all too common. Even though the service was in accord with Nevada statutes, the denial of due process should be obvious and sufficient for plain error even if there were procedural defects in seeking remedy.

Mere form compliance with a statute is not necessarily sufficient for due process. A fundamental requirement of due process of law in any proceeding which is to be accorded finality is notice reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.

It must be reasonably calculated to reach interested parties to afford them due process of law. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). There must be a good faith effort to actually give notice. Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d. 255 (1962). It must be reasonably calculated to inform parties of the proceedings such that they can protect their interests. Walker v. City of Hutchinson, Kan., 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d. 178 (1956). A mere gesture is not enough. The mere following of a statute when plaintiff knows it will in fact not apprise interested parties such that they can protect themselves is not enough. Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956).

It would seem obvious that respondent, who served its own president who in turn did nothing to apprise the association's membership, has to be imputed the knowledge that notice will not be given to the interested parties. Disenfranchisement of the membership in this fashion has to be a denial of due process and its mere occurrence makes necessary a decision on the subject.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Nevada.

Respectfully submitted,

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Las Vegas, Nevada 89101

Counsel for Petitioner

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF NEVADA
Filed September 13, 1977
No. 8372

PARADISE PALMS COMMUNITY ASSOCIATION, a Nevada non stock cooperative association,

Appellant,

-vs-

PARADISE HOMES, a Nevada corporation; IRWIN MOLASKY; HARRY LAHR; MERV ADELSON,

Respondents.

Appeal from summary judgment, Eighth Judicial District Court, Clark County; Joseph S. Pavlikowski, Judge.

Affirmed.

Harry J. Mangrum, Jr.,
Las Vegas,
for Appellant.

Lionel, Sawyer, Collins & Wartman, Las Vegas,
for Respondents.

O P I N I O N

Per Curiam:

Subsequent to our decision in Paradise Palms v. Paradise Homes, 89 Nev. 27, 505 P.2d 596 (1973), the trial court entered summary judgment for respondents on appellant's remaining two claims for relief. Here, appellant asks us to reverse because the trial court (1) lacked jurisdiction to enter summary judgment; (2) erred by granting such judgment; and, (3) violated appellant's right to due process. The contentions are without merit.

1. Appellant first argues that a notice of appeal it had filed from an order denying a change of venue divested the district court of jurisdiction to enter summary judgment. Appellant had filed a notice of appeal on June 27, 1975, but the venue order appealed from was not signed and entered by the court until July 8, 1975, the day summary judgment was entered. See NRAP 4(a); NRCP 58(c). See also Fitzharris v. Phillips, 74 Nev. 371, 333 P.2d 721 (1958). Thus, the notice of appeal, being premature, did not divest the trial court of jurisdiction to enter summary judgment. Df. Wilmurth v. District Court, 80 Nev. 337, 393 P.2d 302 (1964).

We also reject the argument that,

under NRAP 3A(b)(4), the notice of appeal stayed all proceedings in the trial court. After a ruling on the venue motion, the cited rule does provide that "on demand or motion . . .the judge . . . shall make an order staying the trial. . ." Here, even if we assume there was a viable notice of appeal, appellant has failed to establish that it made such a "demand or motion."

2. Appellant argues it was error to grant summary judgment because respondents were in violation of NRS 78.625(2) [1]

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1. NRS 78.625(2) provies: "2. No conveyance, assignment or transfer of any property of any such corporation by it or by an officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid. Every person receiving by means of any prohibited act or deed any property of a corporation shall be bound to account therefor to its creditors or stockholders."

Other than the subjective statement of appellant's counsel, there is absolutely nothing of record to support such a claim. See Dimond v. Linnecke, 87 Nev. 464, 469, 489 P.2d 93, 96-97 (1971), where we said: "Before a transfer comes within that subsecion the record must show the insolvency of the corporation and the intent to prefer the particular credit to whom payment was made." Due to the absence of either circumstance, appellant's reliance on NRS 78.625(2) is misplaced.

3. Finally, appellant contends the trial court violated its right to due process by (1) refusing to set a hearing for its motion to admit out-of-state counsel and to disqualify respondent's counsel for conflict of interest, and (2) not allowing time for discovery regarding the disqualification of the trial judge. Appellant's first claim is without merit; both motions were set for, and in fact heard on June 27, 1975.[2]

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2. The first motion was denied due to the failure to comply with SCR 42. Appellant advance no argument in support of its second motion.

The only argument appellant makes in support of its second claim in, in toto, "District Court refused to permit adequate discovery further violating Plaitniff's right to due process." After reviewing the record, we perceive no abuse of the trial court's discretion in denying further discovery in the matter. See Jones v. Bank of Nevada, 91 Nev. 368, 535 P.2d 1279 (1975).

Affirmed.[3]

/s/ Batjer ,C.J.
Batjer

/s/ Mowbray ,J.
Mowbray

/s/ Thompson ,J.
Thompson

/s/ Beko ,D.J.
Beko

/s/ Smart ,D.J.
Smart

---

3. Mr. Justice Gunderson and Zenoff voluntarily disqualified themselves and took no part in this decision. The Governor, pursuant to Art. VI, § 4 of the Constitution, designated District Court Judges William P. Beko and Stanley A. Smart to sit in their stead.

APPENDIX B

IN THE EIGHTH JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK
Filed July 8, 1975
Case No. A 87019

PARADISE PALMS COMMUNITY ASSOCIATION, a Nevada non stock cooperative association,

Plaintiff,

vs.

PARADISE HOMES, a Nevada corporation; IRWIN MOLASKY; HARRY LAHR; MERV ADELSON, and JOHN DOES I through 30,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT AND SUMMARY JUDGMENT

Defendants' Paradise Homes, Irwin Molasky and Harry Lahr's Cross-Motion for Summary Judgment having come on regularly to be heard on June 27, 1975, and the Court having taken the matter under submission, and good cause appearing therefor, it is hereby

ORDERED that the Cross-Motion for

Summary Judgment be, and the same hereby is granted.

NOW, THEREFOR, it is hereby

ORDERED, ADJUDGED AND DECREED that the Complaint against Defendants Paradise Homes, Irwin Molasky and Harry Lahr be dismissed with costs taxed in the amount of $_____.

DATED this 8th day of July ,1975.

/s/ Joseph S. Pavlikowski
DISTRICT JUDGE

LIONEL, SAWYER COLLINS &
WARTMAN

By /s/ Samuel S. Lionel
Attorneys for Defendants
PARADISE HOMES, IRWIN MOLASKY,
HARRY LAHR

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF NEVADA
Filed December 7, 1977
No. 8372

PARADISE PALMS COMMUNITY ASSOCIATION, a Nevada non stock cooprative (sic) association,

Appellant,

vs.

PARADISE HOMES, a Nevada corporation; IRWIN MOLASKY; HARRY LAHR; MERV ADELSON,

Respondents.

ORDER DENYING REHEARING

Rehearing denied.

It is so ORDERED.

/s/ Batjer ,C.J.
Batjer

/s/ Mowbray ,J.
Mowbray

/s/ Thompson ,J.
Thompson

/s/ Beko ,D.J.
Beko

/s/ Smart ,D.J.
Smart

cc: Harry J. Mangrum, Jr., Esq.
Messrs. Lionel, Sawyer & Collins

APPENDIX D

IN THE EIGHTH JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK
Filed March 4, 1971
Case No. A 87019

PARADISE PALMS COMMUNITY ASSOCIATION, a Nevada non stock cooperative association;

Plaintiff,

vs.

PARADISE HOMES, a Nevada Corporation; IRWIN MOLASKY; HARRY LAHR; MERV ADELSON and JOHN DOES I through 30,

Defendants.

C O M P L A I N T

FIRST CAUSE OF ACTION

I.

Plaintiff has been at all material times alleged herein a Nevada non stock cooperative assn.

II

Defendants, JOHN DOES 1 through and including 30, are sued herein under N.R.C.P. Rule 10, the true names or capacities, whether individual, corporate, associate or otherwise of defendants herein named as JOHN DOES are unknown to plaintiff and, therefore, sues such defendants by such fictitious names and plaintiff will amend this Complaint to show their true names and capacities when the same has been ascertained.

III.

That defendant, PARADISE HOMES, is a Nevada corporation.

IV

That defendants, IRWIN MOLASKY, HARRY LAHR and MERV ADELSON were, at all material times mentioned herein, directors and officers of defendant, PARADISE HOMES.

V

That defendant, PARADISE HOMES, was the owner of a certain parcel of real estate, a description of which is attached hereto as Exhibit "A" and by reference made a part hereof as though set forth in full, which parcel of real estate is hereinafter referred to as PARK, which PARK defendant, PARADISE HOMES, received title to on June 13, 1962.

VI

That at some time between June 13, 1962, and December 31, 1963, the defendant PARADISE HOMES, donated the PARK to ASSOCIATION by delivering a deed thereof to the then officers of said ASSOCIATION, IRWIN MOLASKY, HARRY LAHR and MERV ADELSON, who were also at that time officers of the defedant, PARADISE HOMES.

VII

That defendants, IRWIN MOLASKY, HARRY LAHR and MERV ADELSON along with PARADISE HOMES, as a material inducement to the members of ASSOCIATION, which members exceed the number of seven hundred and fifty (750) as reflected on the document entitled Amended Restrictive Covenants, and attached hereto as Exhibit "B", and by reference made a part hereof, to purchase lots from defendant, PARADISE HOMES, representing to purchasers that the park was in fact donated to the ASSOCIATION as reflected in document No. 285289, Book 353, Clark County Recorder's Office.

VIII

That defendant, PARADISE HOMES, in conjunction with its officers, IRWIN MOLASKY, HARRY LAHR and MERV ADELSON, and JOHN DOES 1 through 30, commenced an action against defendant ASSOCIATION, which case is more particularly styled as Case No. A51193, filed on January 29, 1968, in the Eighth Judicial District Court of the State of Nevada, in and for

the County of Clark, entitled, Paradise Homes, a Nevada corporation vs. Paradise Palms Community Association.

IX

That in said lawsuit defendant, PARADISE HOMES, by and through their directors and officers, and defendants, IRWIN MOLASKY, HARRY LAHR and MERV ADELSON, commenced said lawsuit by serving defendant, IRWIN MOLASKY, with a copy of the Summons and Complaint.

X

That said defendant, PARADISE HOMES, and defendants, IRWIN MOLASKY, HARRY LAHR and MERV ADELSON, knew then and know now that IRWIN MOLASKY was not an officer of defendant ASSOCIATION, and even still further, know that IRWIN MOLASKY is not qualified to hold the office of director or officer of said ASSOCIATION as provided in the Articles of Incorporation and Bylaws of said ASSOCIATION by virtue of the fact that said defendants prepared all of the pertinent documents for said plaintiff, ASSOCIATION.

XI

That service of process on a person who is not an officer of the plaintiff is void and without any force and effect.

SECOND CAUSE OF ACTION

I

Plaintiff repleads allegations I through XI contained in the plaintiff's First Cause of Action as though being stated herein and by reference made a part hereof.

II

That defendant, PARADISE HOMES, is a Class B member of the plaintiff ASSOCIATION, which membership does not entitle them to hold directorship and/or vote on any matters before the ASSOCIATION, however, subjects them to the restrictive covenants and provisions of the Bylaws and Articles of Incorporation of said ASSOCIATION which provide, amongst other things, that no member of the ASSOCIATION can acquire any property of defendant ASSOCIATION, and that no property of the ASSOCIATION shall inure ot the benefit of any members, which include defendant, PARADISE HOMES, or become the property of or payable to any members of the ASSOCIATION.

III

That at the time of commencing said lawsuit, Case No. A51193, defendant PARADISE HOMES, IRWIN MOLASKY, HARRY LAHR and MERV ADELSON, were aware of the fact that the ASSOCIATION was insolvent

or in iminent danger of becoming insolvent for the reasons that the officers and directors had failed to perform their duties as above set forth.

IV

That IRWIN MOLASKY was served with the Summons and Complaint in Case No. A51193 and took no action as an officer of defendant ASSOCIATION to defend said action, but, on the contrary, accepted service of process, and further, acting in concert with plaintiff, PARADISE HOMES, and defendants, HARRY LAHR and MERV ADELSON, permitted a default judgment to be entered against said ASSOCIATION.

V

That the PARK belonging to said ASSOCIATION was then sold at Sheriff's sale to defendant PARADISE HOMES.

VI

That the purpose of the action of defendants, HARRY LAHR and MERV ADELSON, was to deprive the ASSOCIATION and the creditors of the ASSOCIATION and shareholders of the ASSOCIATION of the assets of said ASSOCIATION, all of which is contrary to the defendant, PARADISE HOMES, duty as a member of said ASSOCIATION and further, contrary to N.R.S. 78.625.

VII

That if the Court should find that IRWIN MOLASKY was an officer of said ASSOCIATION at the time of service of process, then the Sheriff's sale is void and in violation of N.R.S. 78.625 and that PARADISE HOMES, holds said PARK as a trustee for said ASSOCIATION and for the benefit of said ASSOCIATION.

VIII

That upon information and belief, plaintiff alleges that it has a good defense to the action taken by defendant, PARADISE HOMES, in Case No. A51193 in that there was failure of consideration for said note as alleged in the First Cause of Action, and further, that payments have been made to PARADISE HOMES BY ASSOCIATION and other offsets due and owing to said ASSOCIATION wherein at the time the said action was commenced ASSOCIATION was not in default under the terms and conditions of said note.

THIRD CAUSE OF ACTION

I

Plaintiff repleads paragraphs I through XI of the First Cause of Action; paragraph I through VIII of the Second Cause of Action, as though being stated herein and by reference made a part hereof.

II

That by virtue of the acts of defendants, PARADISE HOMES, IRWIN MOLASKY, HARRY LAHR and MERV ADELSON and JOHN DOES 1 through 30, said ASSOCIATION has been damged in the amount of $250,000.00.

WHEREFORE, plaintiff prays for judgment against defendants as follows:

1. Under the First Cause of Action, plaintiff prays that the judgment heretofore entered in Case No. A51193 be declared void for the reasons stated in said First Cause of Action, for costs of the action; and for such other and further relief as to the Court may seem proper in the premises.

2. Under the Second Cause of Action, plaintiff prays that plaintiff have judgment against defendants, PARADISE HOMES, IRWIN MOLASKY, HARRY LAHR and MERV ADELSON, jointly and severally, declaring that defendant, PARADISE HOMES holds the PARK as trustee for said plaintiff ASSOCIATION, and further compelling PARADISE HOMES to reconvey said PARK, upon such just and equitable terms, and for such other and further relief as to the Court may seem proper in the premises.

3. Under the Third Cause of Action and in the alternative to the relief prayed for in the First and Second Cause of Action, plaintiff demands judgment against the defendants, PARADISE HOMES, IRWIN MOLASKY, HARRY LAHR and MERV ADELSON and JOHN DOES 1 through 30, for the sum of $250,000.00; for costs of the action; and for such other and further relief as to the Court may seem proper in the premises.

/s/ H. J. Mangrum, Jr.
H. J. MANGRUM
Attorney for Plaintiff
323 Las Vegas Boulevard, South
Las Vegas, Nevada 89101

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

PAUL HETT, being first duly sworn, deposes and says:

That he is the Vice President of the plaintiff ASSOCIATION in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; that the same is true to his knowledge, except as to matter therein stated on information and belief,

and as to those matters, he believes it to be true.

/s/ Paul Hett
PAUL HETT

Subscribed and sworn to before me this 4th day of March, 1971

/s/ Marsha K. Mosley
Notary Public in and for said County and State

APPENDIX E

EXCERPT FROM THE RECORD

Notice and Motion for
Summary Judgment

IF A CORPORATE OFFICER, IN COLLUSION WITH PURPORTED CREDITORS, ACCEPTS SERVICE OF PROCESS WITHOUT NOTIFICATION AND ALLOWS JUDGMENT TO BE ENTERED AGAINST IT, ALTHOUGH THE JUDGMENT MAY BE COMPLETELY VALID AT LAW AND BEYOND LEGAL ATTACK, EQUITY WILL REDRESS IT.

Lang Syne Mining Co. v. Ross,
20 Nev. 127, 18 Pac. 358 (1888)

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A CONSTRUCTIVE TRUST ARISES WHENEVER THE CIRCUMSTANCES UNDER WHICH PROPERTY WAS ACQUIRED MAKE IT INEQUITABLE THAT IT BE RETAINED BY THE HOLDER OF LEGAL TITLE WHERE SOME CONFIDENTIAL RELATIONSHIP EXISTED AND THE IMPOSITION OF A TRUST IS NECESSARY TO PREVENT A FAILURE OF JUSTICE.

Schmidt v. Merriweather,
82 Nev. 372, 375, 418 P.2d 991 (1960)

****

A SECRETARY-TREASURER, LIKE ALL OTHER CORPORATE OFFICERS, OCCUPIES A FIDUCIARY RELATIONSHIP OF THE HIGHEST TRUST AND CONFIDENCE, AND MUST EXERCISE THE UTMOST

GOOD FAITH IN DISCHARGING HIS DUTIES, AND HAS NO RIGHT TO USE HIS POSITION FOR HIW OWN BENEFIT OR PROFIT, OR FOR THE BENEFIT OF ANYONE EXCEPT THE CORPORATION.

Edwards v. Carson Water Co.,
21 Nev. 469, 34 Pac. 381 (1893)

****

WHERE ONE VIOLATES HIS FIDUCIARY RELATIONSHIP FOR THE PURPOSE OF ACQUIRING, SPENDING, USING OR CONSUMING PROPERTY RIGHTFULLY BELONGING TO ONE TOWARD WHOM HE OWES SUCH A HIGH DUTY, NOT ONLY WILL HE BE CHARGED WITH A CONSTRUCTIVE TRUST AS TO ANY AVAILS OF HIS BREACH OF TRUST, BUT EXEMPLARY DAMAGES ARE PROPERLY IMPOSED UNDER NRS 42.010 TO REDRESS OPPRESSIVE FRAUD DEEMED BY EQUITY TO BE AS REPREHENSIBLE AS CRIMINAL EMBEZZLEMENT.

Randano v. Turk,
86 Nev. 123, 129-130, 466 P.2d 218 (1970)

THE SAID DUAL CAPACITY OF IRWIN MOLASKY IS A CONFLICT OF INTEREST AND A FRAUD ON THE COURT.

THE RESULT OF SAID FRAUD AND THE TAKING ADVANTAGE OF A POSITION OF TRUST HAS DEPRIVED PARADISE PALMS COMMUNITY ASSOCIATION OF A RIGHT TO DEFEND SAID ACTION, AND THE ACTION OF ANY COURT SUSTAING THE RESULTANT JUDGMENT IS A DENIAL OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

APPENDIX F

EXCERPT FROM THE RECORD

(Proposed)
First Amended and Supplemental
Complaint

XIV

That thereafter the Defendants levied a writ of execution upon said judgment against the sole asset of PARADISE PALMS COMMUNITY ASSOCIATION, the real property utilized by it and its members, and the public, as a park facility, as mentioned in Paragraph IV hereinabove, on the 23rd day of February, 1968.

XV

That pursuant to the aforesaid levy, a Sheriff's sale of said real property and PARK was conducted by the Sheriff of Clark County, Ralph Lamb, by and through a deputy sheriff, on the 25th day of March, 1968.

XVI

That the aforesaid judgment was entered in direct violation of the rights of PARADISE PALMS COMMUNITY ASSOCIATION and its members, as guaranteed to them by the Constitution of the State of Nevada, Article 1, Section 1, that "ALL MEN HAVE CERTAIN INALIENABLE RIGHTS

AMONG WHICH ARE.... ACQUIRING, POSSESSING AND PROTECTING PROPERTY AND PURSUING AND OBTAINING SAFETY AND HAPPINESS,"; Article 1, Section 8, that "NO PERSON SHALL BE.... DEPRIVED OF....PROPERTY, WITHOUT DUE PROCESS OF LAW", and the United States Constitution, Amendment XIV, Section 1, that "NO STATE SHALL....DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS"; and was, and is wholly void.

XVII

That notwithstanding that the aforesaid judgment is wholly void, the Defendants claim title to the Plaintiff's aforesaid real property under the same and the Sheriff's documents of transfer thereunder.

XVIII

That the aforesaid judgment and documents of transfer constitute a cloud upon Plaintiff's and its members' title to the said real property, which Defendants have wholly failed and refused to remove.

APPENDIX G

EXCERPT FROM APPELLANT'S OPENING BRIEF

IN THE SUPREME COURT OF
THE STATE OF NEVADA
No. 8372

If a corporate officer, in collusion with purported creditors, accepts service of process without notification and allows judgment to be entered against it, although the judgment may be completely valid at law and beyond legal attack, equity will redress if. Lang Syne Mining Co. v. Ross, 20 Nev. 127, 18 P. 358 (1888). A constructive trust arises whenever the circumstances under which the property was acquired make it inequitable that it be retained by the holder of legal title where some confidential relationship existed and the imposition of a trust is necessary to prevent a failure of justice. Schmidt v. Merriweather, 21 Nev. 469, 34 P. 381 (1893). Where one violates his fiduciary relationship for the purpose of acquiring, spending, using or consuming property rightfully belonging to one toward whom he owes such a high duty, not only will he be charged with a constructive trust as to any avails of his breach of trust, but exemplary damages are properly imposed under NRS 42.010 to redress oppressive fraud deemed by equity to be as reprehensible as criminal embezzlement. Randano v. Turk, 86 Nev. 123, 129-130, 466 P.2d 218

(1970). The said dual capacity of Irwin Molasky is a conflict of interest and a fraud on the court. The standard of care that Mr. Molasky owed to a public corporation is even higher than to a private corporation since he is dealing with public funds.

The result of said fraud and the taking advantage of a position of trust has deprived Paradise Palms Community Association of a right to defend said action, and the action of any court sustaining the resultant judgment is a denial of due process under the Fourteenth Amendment to the Constitution of the United States and to permit the Defendant to profit by their fraud would be still further denial of due process.

(2) DISTRICT COURT EXCEEDED ITS JURISDICTION WHEN IT ENTERED SUMMARY JUDGMENT WHILE AN APPEAL WAS PENDING TO CHANGE THE PLACE OF TRIAL.

The Plaintiff, COMMUNITY ASSOCIATION filed its Motion to change place of trial. (Folio 733) Plaintiff demanded that the court stay the proceeding. NRAP Rule 3A. (b)(4) provids for the stay on demand. To refuse the stay is to deny Plaintiff, COMMUNITY ASSOCIATION due process of law and exceed the trial courts jurisdiction.

(3) DISTRICT COURT FURTHER ERRED AND VIOLATED THE PLAINTIFF'S RIGHT TO DUE PROCESS BY VARIOUS ACTS AND FAILURES TO ACT.

The District Court refused to allow adequate time, permit admission and participation by Plaintiff's out-of-state counsel. This violated the Fifth and Fourteenth Amendments to the United States Consitution. Spanos vs. Skours Theatres Corp, 235 F.Supp 1, 364 F 2d 161 (CA2) Cert. Den. 385 U.S. 987, 17 L.Ed.2d 448 87 S.Ct. 597 (1966).

District Court refused to permit adequate discovery further violating Plaintiff's right to due process of law.

Plaintiff further moved to disqualify Defendant's counsel for using information against an officer of COMMUNITY ASSOCIATION which information Defendant's counsel received in a confidential manner representing said officer. (Folio 772 and 769 through 771) Defendant's counsel even received a copy of correspondence to Plaintiff's counsel.

APPENDIX H

IN THE SUPREME COURT OF
THE STATE OF NEVADA
No. 8372

PARADISE PALMS COMMUNITY ASSOCIATION, a Nevada non stock cooperative association,

Appellant,

vs.

PARADISE HOMES, a Nevada crporation; IRWIN MOLASKY; HARRY LAHR; MERV ADELSON and JOHN DOES I through 30,

Respondents.

APPELLANT'S REPLY BRIEF

We continue to toil in this monstrous satire on jurisprudence. If someone were to ask by what casuistry one corporation could obtain a default judgment against another by service on its own principle officer,

one, having no knowledge of this case, would be at a loss to answer. Anyone who considers "due process something more that just two somewhat ambiguous words and believes that it has something to do with fair play should retch at what has obtained here.

Both the judge who granted the default and the judge who denied the motions to set aside, shortly after joined the law firm for the other side.[1] Now we are informed that the then Chief Justice sitting on the original appeal (a per

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1. Alvin N. Wartman entered the original default judgment on February 23, 1968, and joined the firm of Lionel and Sawyer on October 16, 1969, which became Lionel, Sawyer & Wartman. Taylor Wines denied the motion to set aside the judgment on November 7, 1969, and denied the motion to alter or amend the judgment on December 11, 1969. He left office and joined Lionel, Sawyer & Wartman on January 19, 1970.

curiam opinion) was formerly counsel for the other side. (Appendix A). How possibly could that decision be res judicata of anything?

All the procedural games aside, the fact remains that paradise Homes served process on its own President, took default without a word to anyone, and then itself bought the Association's property at an execution sale. Lewis Carroll never imagined anything to equal that for his Alice in Wonderland!

That collection of sophism, called Respondent's Answering Brief[2], cannot

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2. An example: In the original case, Paradise Palms Community Association v. Paradise Homes, 86 Nev. 859, 477 P.2d 859 (1970), the appeal from the decision on motions was denied on the ground that it was not timely filed. The Respondents now tell us that the Supreme Court implicitly reversed the trial court's ruling of lack of standing. (Respondent's Answering Brief, p. 5). Anyone remember Abbott and Costello? "Who's on first?"

change the fact that the original judgment was based on fraudulently procured jurisdiction in conflict of interest.[3] We need

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3. Mr. Lionel now takes the position that Mr. Molasky was not an officer of the Association. (Respondent's Answering Brief, p. 23). This, of course, would void service entirely. The fact that Molasky was an officer of the Association was established in the initial action and pressed upon Appellant as res judicata for the First Cause of Action here, which claimed he was not an officer. Paradise Palms Community Association v. Paradise Homes, 89 Nev. 27, 505 P.2d 596 (1973). He cannot foreclose Appellant from proving a fact by estoppel for one cause of action and then himself say it is the other way when it suits his purpose for the other cause.

That still does not change the fact that Molasky as President of Paradise Homes accepted service supposedly as an officer of the Association. Molasky has to have assumed some duty beyond silently allowing the matter to go by default. The suit at hand provides for relief whether Molasky was an officer of the Association or not. Paradise Homes cannot exploit dual offices in this manner to its advantage. Lang Syne Mining Co. v. Ross, 20 Nev. 127, 18 Pac. 358 (1888). Even if the Plaintiff-Appellant below mistook its remedies, the judgment must be set aside.

not say more. The trial court must be reversed with direction to enter Summary Judgment for the Appellant to save any semblance of honor.

DATED this 23rd day of June, 1976.

/s/ Harry J. Mangrum, Jr.
HARRY J. MANGRUM, JR.,ESQ.
Attorney for Appellant
323 Las Vegas Blvd. South
Las Vegas, Nevada 89101

APPENDIX I

IN THE SUPREME COURT OF
THE STATE OF NEVADA
No. 8372

PARADISE PALMS COMMUNITY ASSOCIATION, a Nevada non stock cooperative association,

Appellant,

vs.

PARADISE HOMES, a Nevada corporation; IRWIN MOLASKY; HARRY LAHR; MERV ADELSON and JOHN DOES I through 30,

Respondents.

PETITION FOR REHEARING

The appellant respectfully petitions the Court to grant a rehearing on the above matter because the decision ignores the real issue in the case, appellant's cause of action for relief: That the property involved was acquired by respondent at a sheriff's sale as the result of a default judgment obtained by respondent, Paradise Homes, through service of process on its own president without any other notice to anyone. This has to be a violation of due process under both the State and Federal Constitutions.

The basic facts are not in dispute. Irwin Molasky was president of Paradise Homes, Inc. Jurisdiction in the lawsuit, Paradise Homes, Inc. v. Paradise Palms Community Assoc., Case No. 51193 was obtained by the service of Molasky as an officer of the Association. The papers were given back to the attorney for Paradise Homes and no other notice of any kind was given. A default judgment was taken and Paradise Homes procured the property at a sheriff's sale. The judgment has to be a denial of due process, contrary to the Fourteenth Amendment to the Constitution of the United States. Appellant has a right to a decision on this point. This question was presented in the motion for summary judgment and in point one of the appeal.

Respectfully submitted,

/s/ Patrick R. Doyle
HARRY J. MANGRUM, JR.
PATRICK R. DOYLE
323 Las Vegas Blvd. South
Las Vegas, Nevada 89101

Attorneys for Appellant

APPENDIX J

EXCERPT FROM THE RECORD

Request for Admissions
and
Answer to Request for Admissions

Request for Admissions

6. Admit or deny that from on or before the 10th day of December, 1959 until on or about the 30th day of January, 1970, the defendant, IRWIN MOLASKY, was a director of the defendant, PARADISE HOMES.

7. Admit or deny that from on or before the 10th day of December, 1959, until on or about the 15th day of June, 1961, and from on or abouth the 8th day of August, 1961 until on or about the 30th day of January, 1970, defendant IRWIN MOLASKY, was the President of the defendant, PARADISE HOMES.

11. Admit or deny that the premises referred to in Exhibit A and B hereto, to wit: 953-32 East Sahara Avenue, were, on the 29th day of January, 1968, the principal office of the defendant corporation, PARADISE HOMES.

12. Admit or deny that on the 29th day of January, 1968, defendant, IRWIN MOLASKY, was president and resident agent of defendant, PARADISE HOMES.

Answer to Request for Admissions

	IRWIN MOLASKY	HARRY LAHR
6.	Admits	Admits
7.	Admits	Admits only to the period August 1, 1961 to January, 1970. Deponent was not associated with Paradise Homes, a Nevada corporation during the earlier period.
11.	Admits	Admits
12.	Admits	Admits

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing Petition for a Writ of Certiorari was served on the following by mailing two copies thereof, first class mail, postage prepaid to:

LIONEL, SAWYER & COLLINS
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

on the 5th day of March, 1978.

/s/ Sarah S. Higgins
Sarah S. Higgins